

Commonwealth of Kentucky
Before the Public Service Commission

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In the Matter of:

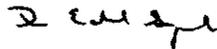
TRANSFER OF WASTEWATER TREATMENT)
ASSETS AND BUSINESS OF ORCHARD GRASS)
UTILITIES, INC. TO OLDHAM COUNTY)
SEWER DISTRICT)

Case No. 2004-00029

ATTORNEY GENERAL'S
POST-HEARING COMMENTS

Respectfully submitted,

GREGORY D. STUMBO
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The Public Service Commission has the inherent authority to prevent a discontinuance of service. The standard set forth in KRS 278.020(4) provides an appropriate basis for a Commission analysis of a transfer of ownership of a “utility” to a sanitation district.

The Commission’s jurisdiction with regard to sanitation districts is an area that has been the subject of dispute and judicial resolution.¹ The judiciary has held that the Oldham County Sanitation District is exempt from regulation by the Commission.²

The Commission has always had inherent or implied power to review a transfer of control of a utility in order to prevent a discontinuance of service.³ While the Sanitation District may be exempt from KRS Chapter 278, Orchard Grass is subject to the authority of the Commission. Thus, there is no doubt that transfer of control of Orchard Grass Utilities, Inc., is subject to some level of Commission review.

While there may be some disagreement over the exact basis of the Commission’s power, there is no question that the Oldham County Sanitation District must demonstrate that it is “ready, willing and able to continue to provide adequate service.”⁴ The manner in which the Commission seeks to make this determination is by an analysis of whether the District has “the financial, technical, and managerial abilities to provide reasonable service” – the KRS 278.020(4) requirement.

¹ See *Boone County Water and Sewer District v. Public Service Commission*, Ky., 949 S.W.2d 588 (1997).

² *Oldham County Sanitation District v. Kentucky Public Service Commission*, (Case No. 2001-CA-001482-MR) Opinion, 12 July 2002; Discretionary Review denied by the Supreme Court of Kentucky (Case No. 2002-SC-000839) 10 September 2003. While the Court of Appeal’s opinion is a “Not To Be Published” opinion, CR 76.28(4)(c) does not prohibit reference of this opinion in a subsequent proceeding involving OCSD and the PSC. The holding is the judicial determination of the PSC’s jurisdiction with regard to the OCSD.

³ *Public Service Commission v. Cities of Southgate, Highland Heights, Ky.*, 268 S.W.2d 19 (1954)

⁴ See *Public Service Commission v. Cities of Southgate, Highland Heights, Ky.*, 268 S.W.2d at 21.

The Joint Applicants, Intervenor Madison, the Attorney General, and Commission Staff appear to be in agreement that the Joint Applicants must, at least, demonstrate that the Sanitation District satisfies the Subsection 4 standard.⁵ Consequently, whether the basis for the Commission's review of this transaction is the Commission's implied powers or whether the basis for the Commission's review is the view that a sanitation district falls within the scope of KRS 278.020(4), the end result is the same – the PSC must determine that the District is capable of continuing the provision of adequate service.⁶

The Commission's application of the Subsection 4 standard is wholly consistent with the Commission's duty to prevent a discontinuance of service. The Attorney General submits that the evidence permits a conclusion that the Sanitation District meets the definition of a "ready, willing and able" purchaser and otherwise satisfies the Subsection 4 requirement. Accordingly, the Attorney General does not object to the transaction.

⁵ 15 April 2004 Public Hearing at 09:10:50 to 09:12:45.

⁶ The Commission's duty under KRS 278.020(4) appears to be coextensive with its duty under its inherent or undisputable power as per *Cities of Southgate, Highland Heights*.

KRS 278.020(5) does not apply to this transaction.

At the public hearing, the Office of the Attorney General took the position that both KRS 278.020(4) and KRS 278.020(5) are applicable to this transaction. After reconsideration of the relevant statutes and case law, KRS 278.020(5) simply does not apply. A Sanitation District does not fall within the category of entities subject to Subsection 5.⁷ Hence, an analysis under Subsection 5 is not relevant to the proceeding, and the Commission's powers under Subsection 5 are not applicable.

⁷ It is unnecessary and unwarranted in this proceeding to discuss all aspects of the scope or applicability of KRS 278.020(5). Suffice to say, it does not apply to sanitation districts.

Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of the Attorney General's Post-Hearing Comments were served and filed by hand delivery to Thomas M. Dorman, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true and correct of the same, first class postage prepaid, Carroll F. Cogan, Orchard Grass Utilities, Inc., 1706 Bardstown Road, Louisville, Kentucky 40205; Forest B. Ewen, Oldham County Sanitation District, 7311 Highway 329, Suite 542, Crestwood, Kentucky 40014; Robert L. Madison, 5407 Baywood Drive, Louisville, Kentucky 40241-1318; Edward L. Schoenbaechler, Hall, Render, Killian, Heath & Lyman, The KHA Building, Suite 102, 2501 Nelson Miller Parkway, Louisville, Kentucky 40223; and Robert C. Moore, Hazelrigg & Cox, LLP, P. O. Box 676, Frankfort, Kentucky 40602, all on this 26th day of April 2004.


Assistant Attorney General